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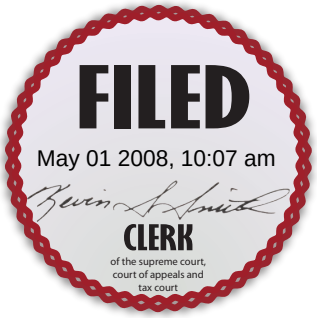

ATTORNEYS FOR APPELLANT:

STEVE CARTER
Attorney General of Indiana

CYNTHIA L. PLOUGHE
Deputy Attorney General
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL J. HOLLENBECK
Lawrenceburg, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 15A01-0707-CR-289
	)	
ROBERT E. SAVAGE,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0702-FD-19

May 1, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The State appeals the trial court's grant of Robert E. Savage's motion to suppress. The sole issue raised by the State on appeal is whether the trial court properly granted Savage's motion to suppress.

We affirm.

On February 14, 2007, Officer Ryan Brandt of the Dillsboro Police Department in Dearborn County, Indiana prepared an affidavit seeking a search warrant authorizing a search of Savage's residence. The relevant portion of the affidavit states:

> That on the 14th day of February 2007, your affiant was contacted by a concerned citizen in reference to receiving marijuana. The concerned citizen advised your affiant that he/she received marijuana from a resident of the Savage household. The concerned citizen advised your affiant that on February 14, 2007, he was at the residence of Robert Savage at 9860 Front Street in Dillsboro, Indiana. That while at said residence a resident of the Savage household stated that Robert Savage had a bag of marijuana in the residence. The concerned citizen further advised your affiant that he received a portion of the marijuana from the resident and that he was advised that there was more marijuana in the residence. That the concerned citizen provided the marijuana to your affiant. That your affiant observed the substance to be a [sic] approximately a gram of a green plantlike substance that your affiant knows from his prior training and experience to be marijuana.

Appellant's Appendix at 14. Based upon this affidavit, Dearborn County Superior Court Judge Sally Blankenship issued a search warrant for Savage's home. A copy of the search warrant and Officer Brandt's affidavit were left with Judge Blankenship. Both of these documents were later filed with the trial court clerk on February 26, 2007.

In executing the search warrant, officers found marijuana and various items of drug paraphernalia. The State charged Savage with maintaining a common nuisance as a

class D felony, possession of marijuana as a class A misdemeanor, and possession of paraphernalia as a class A misdemeanor.

On April 5, 2007, Savage filed a motion to suppress, and the trial court held a hearing on that motion on May 22, 2007. At the hearing, Officer Brandt testified that he was not at liberty to disclose the identity of the concerned citizen mentioned in his affidavit. He stated that he did not consider the concerned citizen to be a confidential informant. At one point, Officer Brandt was asked how he determined that the concerned citizen was credible and he said, "By some previous information had been given to us about Mr. Savage having tried to grow marijuana plants in the past. We had prior information about that." *Transcript* at 7. The court asked Officer Brandt whether this prior information about Savage had been provided by the concerned citizen, and Officer Brandt said that it had. Defense counsel then asked, "As far as the information you received previously you never obtained a warrant and verified if that information was correct, did you?" *Id.* at 8. Officer Brandt confirmed that no investigation had been done to verify the accuracy of this information.

On June 7, 2007, the trial court issued an order granting Savage's motion to suppress. The trial court first found that Officer Brandt's affidavit was not properly filed and, as a result, there was insufficient probable cause to issue the search warrant. Even if the affidavit was properly filed, the trial court found that Officer Brandt's affidavit did not contain sufficient evidence to support a finding of probable cause to search and that the good faith exception did not apply in this case. On June 22, 2007, the State filed a motion to dismiss the charges against Savage, and this appeal ensued.

On appeal from the grant of a motion to suppress, the State appeals from a negative judgment and must show that the trial court's ruling was contrary to law. *State v. Williamson*, 852 N.E.2d 962 (Ind. Ct. App. 2006). "We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court." *Id.* at 965. We will only consider the evidence most favorable to the judgment and will not reweigh the evidence or judge the credibility of the witnesses. *State v. Williamson*, 852 N.E.2d 962.

1.

The State first argues that the trial court erred in granting Savage's motion to suppress because the affidavit was improperly filed. Here, the search warrant was signed by Judge Blankenship at her home on the night of February 14, 2007. A copy of the search warrant and Officer Brandt's affidavit were left with Judge Blankenship, and both of these documents were later filed with the trial court clerk on February 26, 2007.

Ind. Code Ann. § 35-33-5-2(a) (West, PREMISE through 2007 1st Regular Sess.) provides that "no warrant for search or arrest shall be issued until there is *filed with the judge* an affidavit . . . ." (Emphasis supplied.) The State argued that by leaving a copy of the search warrant and Officer Brandt's affidavit with Judge Blankenship, it had fulfilled the requirements of I.C. §35-33-5-2(a).

The trial court disagreed. It pointed out that Trial Rule 5(F) lists the various ways documents can be filed with the court. The trial court noted that Trial Rule 5(F)(5) authorizes, "[i]f the court so permits, filing with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk." The

trial court stated, "Filing with the judge is not synonymous with leaving a copy with the judge at her home or office. The act of filing with a judge is not complete until the judge *shall note thereon the filing date and forthwith transmit them to the office of the clerk.*" *Appellant's Appendix* at 30 (emphasis in original). The trial court found that Judge Blankenship had not noted the filing date on Officer Brandt's affidavit and that the search warrant and affidavit had not been timely transmitted to the clerk's office. The trial court concluded that "[t]he untimely filing of the affidavit results in a lack of probable cause due to a lack of oath or affirmation." *Id.* at 37.

We recently addressed this same issue in *Scott v. State*, 2008 WL 755889 (Ind. Ct. App. 2008). In that case, Judge S. Brent Almon signed a search warrant on October 10, 2006. A copy of the search warrant and the probable cause affidavit were left with Judge Almon, who gave both of these documents to his court reporter the next day. The documents, though, were not filed with the clerk's office until April 2, 2007. On appeal, Scott argued that the probable cause affidavit supporting the search warrant was not properly filed because, although it was left with Judge Almon, it was not filed with the clerk's office until April 2, 2007. We noted that the "plain language of Indiana Code section 35-33-5-2 requires that the affidavit be filed with the judge . . . ." *Id.* at *4. We determined that this requirement was met when the officer personally handed the probable cause affidavit to Judge Almon. *Scott v. State*, 2008 WL 755889. We noted that there was "nothing in the record to suggest that [the officer] had any reason to believe that the affidavit would not be promptly filed with the clerk, and, in the end, we are at a loss to see how he could have more fully complied with Indiana Code section 35-

33-5-2." *Id.* at *4. We concluded that the affidavit supporting the search warrant was properly filed. *Scott v. State*, 2008 WL 755889.

Here, as in *Scott*, Officer Brandt fulfilled the filing requirement of I.C. § 35-33-5-2 by personally providing Judge Blankenship with a copy of his affidavit. Officer Brandt's affidavit in support of the February 14, 2007 search warrant was properly filed. Therefore, the trial court erred in granting Savage's motion to suppress on this ground.

2.

The State next argues that the trial court erred in concluding that Officer Brandt's affidavit did not contain sufficient evidence to support a finding of probable cause to search. It contends that the information provided by the concerned citizen was sufficient to establish probable cause.

The Fourth Amendment to the United States Constitution guarantees that a search warrant will not be issued without probable cause. Probable cause to search a premises is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime. *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004).

> In deciding whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of the reviewing court is to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. Substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. "Reviewing court" for these purposes

> includes both the trial court ruling on a motion to suppress and an appellate court reviewing the decision.

Scott v. State, 2008 WL 755889 at *5 (quoting *Jaggers v. State*, 687 N.E.2d 180, 181-82 (Ind. 1997)).

"Information gleaned from cooperative citizens who are either eyewitnesses or victims of a crime may be relied upon in determining whether probable cause exists for a search where there are no circumstances which call the informant's motives into question." *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003), *trans. denied*. "[I]f an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary." *Illinois v. Gates*, 462 U.S. 213, 233-34 (1983).

Although rigorous scrutiny is unnecessary, some scrutiny is still required. Our Supreme Court has held that a tip from a concerned citizen coupled with some corroborative police investigation is sufficient to create reasonable suspicion for an investigative stop. *Kellems v. State*, 842 N.E.2d 352 (Ind. 2006). As we have already stated, under the Fourth Amendment, a search warrant will not be issued without probable cause. Probable cause is a more demanding standard than reasonable suspicion. *See Kellems v. State*, 842 N.E.2d 352. "[U]ncorroborated hearsay from a source whose credibility is itself unknown is insufficient by itself to support a finding of probable cause." *Frasier v. State*, 794 N.E.2d at 456. This would seem to suggest that in some cases, but perhaps not all, an uncorroborated tip from a concerned citizen standing alone

would not be sufficient to support a finding of probable cause. Nevertheless, the amount of evidence necessary to satisfy the probable cause test is largely determined on a case-by-case basis taking into consideration the totality of the circumstances. *Kellems v. State*, 842 N.E.2d 352.

Here, the finding of probable cause was based solely on the information provided by the concerned citizen. Officer Brandt's affidavit does not indicate that the police conducted any sort of independent investigation to corroborate the accuracy of the information provided by the concerned citizen. Such an investigation could have, at the very least, confirmed that the concerned citizen went to Savage's home on February 14, 2007. Without any such investigation, we agree with the trial court that "[t]here is no corroboration of the [concerned citizen's] acquisition of marijuana from the defendant's residence. He could just as easily have obtained the marijuana from some other source, and then provided it to the affiant in order to set up the target." *Appellant's Appendix* at 35. Because no investigation was conducted, the trial court correctly noted that Officer Brandt's affidavit lacks "any corroboration of the critical claim that there is criminal activity inside [Savage's] house." *Id.*

Additionally, there was no corroboration of the concerned citizen's credibility. We agree with the trial court that the term '"concerned citizen' is not a magical incantation that automatically brings credibility to an anonymous hearsay statement." *Id.* When Officer Brandt was asked how he determined that the concerned citizen was credible, he testified that the concerned citizen had previously provided information to the police that Savage was trying to grow marijuana. Officer Brandt, though, conceded

that no investigation was conducted to verify the accuracy of this tip. Thus, this prior encounter does not establish the credibility of the concerned citizen.

This past tip to the police about Savage also raises concerns about the concerned citizen's motives. Concerned citizens are usually one-time informants. *Kellems v. State*, 842 N.E.2d 352. The fact that the concerned citizen has now reported Savage to the police twice suggests that he or she may have some sort of malicious reason for making such reports. A corroborative investigation by the police could have dispelled such concerns.

Without any corroborative police investigation, we conclude that the information provided by the concerned citizen alone was not sufficient evidence to support a finding of probable cause to search Savage's residence. Therefore, the trial court properly granted Savage's motion to suppress.

3.

The State next contends that even if the search warrant was not supported by probable cause, the police relied in good faith on the search warrant and, thus, the evidence obtained from the search should not be excluded.

"Generally, when evidence is obtained in violation of the Fourth Amendment, such evidence may not be used against a defendant at trial." *Frasier v. State*, 794 N.E.2d at 457. There, however, are exceptions to this general principle, one of which is the "good faith" exception. *Frasier v. State*, 794 N.E.2d 449. Under this exception, the exclusionary rule does not require the suppression of evidence obtained in reliance upon

a defective search warrant if the police relied upon such a warrant in objective good faith. *Id.*

The good faith exception has been codified in Ind. Code Ann. § 35-37-4-5 (West, PREMISE through 2007 1st Regular Sess.), which, in relevant part, states:

> (a) In a prosecution for a crime or a proceeding to enforce an ordinance or a statute defining an infraction, the court may not grant a motion to exclude evidence on the grounds that the search or seizure by which the evidence was obtained was unlawful if the evidence was obtained by a law enforcement officer in good faith.
> (b) For purposes of this section, evidence is obtained by a law enforcement officer in good faith if:
> (1) it is obtained pursuant to:
> (A) a search warrant that was properly issued upon a determination of probable cause by a neutral and detached magistrate, that is free from obvious defects other than nondeliberate errors made in its preparation, and that was reasonably believed by the law enforcement officer to be valid; or
> (B) a state statute, judicial precedent, or court rule that is later declared unconstitutional or otherwise invalidated; and
> (2) the law enforcement officer, at the time he obtains the evidence, has satisfied applicable minimum basic training requirements established by rules adopted by the law enforcement training board under IC 5-2-1-9.

The good faith exception does not apply in situations where (1) the magistrate is misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) the issuing magistrate wholly abandoned his judicial role; (3) the warrant was based upon an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient, i.e., in failing to particularize the place to be searched or the things to be seized, that the executing police officers cannot

reasonably presume it to be valid. *Frasier v. State*, 794 N.E.2d 449. "Although we should be careful not to equate the reasonableness of the officer's belief with the establishment of probable cause in the affidavit, it is equally critical that we do not construe the good faith exception so broadly as to obliterate the exclusionary rule." *Id.*

Our Supreme Court has also noted that two things should be abundantly clear to law enforcement officers who, as in this case, seek a warrant based on hearsay: (1) the informant must be shown to be credible; or (2) the information must be shown to be reliable through corroboration or some other means. *Jaggers v. State*, 687 N.E.2d 180. The court has "emphasized that corroboration of inculpating information can sometimes be crucial to determining the existence of good faith." *Id.* at 185.

Savage argues that Officer Brandt's affidavit supporting the search warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. We agree. On its face, Officer Brandt's affidavit indicates that the only information obtained by police pertaining to the allegations of criminal activity by Savage was provided by the concerned citizen. The police did not engage in any sort of investigation to corroborate the concerned citizen's allegations. No effort was made by the police to corroborate that the concerned citizen actually went to Savage's home on February 14, 2007, and that the marijuana he or she turned over to Officer Brandt came from Savage. Additionally, no effort was made by the police to assess the credibility of the concerned citizen. In this case, the rationale behind the good faith exception "is not advanced by effectively allowing the State to claim good faith reliance on a warrant after a less than faithful effort to establish probable cause to obtain it." *Jaggers v. State*, 687

N.E.2d at 186. Therefore, we conclude that the good faith exception does not apply here and that the trial court properly granted Savage's motion to suppress.

Ruling affirmed.

MATHIAS, J., and ROBB, J., concur.